In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 933

ART JOHNSTON, PETITIONER

v.

HUGH E. EARLE, WALTER B. SHANKS, IRWIN BORTHICK, AND IRVING H. CURRAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

This is a civil action for conversion of petitioner's tractor. It was originally brought in an Oregon State court against four Internal Revenue officers (respondents) who seized the tractor by virtue of a federal tax lien arising out of the unsatisfied tax liability of its former owner. Because the acts complained of were committed by respondents in the performance of their duties as federal officers, the cause was removed to the federal court. (Pet. 13–14.)

The applicable State statute of limitations requires such actions to be brought within six years. (1 Oregon Revised Statutes, 1953, Section 12.080(4).) The instant action, filed on July 29, 1957 (Pet. 16.), is the

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equal to an earlier suit on the same cause of action which was filed on July 2, 1954, and dismissed on June 3, 1957. (Pet. 15–16.) The Oregon savings statute provides that if an action is timely brought and dismissed after the limitations period has expired, another may be brought within one year. (1 Oregon Revised Statutes, 1953, Section 12.220.) Accordingly, the present action is timely if, but only if, the alleged conversion of the tractors took place after July 1, 1948—less than six years prior to the commencement of the earlier suit.

The case was tried to the district court sitting without a jury. The court found from a preponderance of the evidence that the seizure took place on July 1, 1948, when the respondents located the tractor near Colton, Clackamas County, Oregon, levied upon it pursuant to the warrant for distraint, placed seizure tags on it, and, to ensure that it would not be moved, removed the carburetor and crank extension. (Pet. 18.) It further found that the acts of the respondents on July 2, 1948, when they returned, loaded the tractor on carrying equipment, and removed it, did not themselves constitute the seizure, but were acts in furtherance of the posted seizure the day before. (Pet. 18.)

The court of appeals ruled that the district court's finding that the conversion occurred on July 1, 1948, was "sound in law and supported by substantial evidence." (Pet. 23.) Though acknowledging a conflict of testimony as to the date upon which the acts of conversion took place (Pet. 23), the court of appeals properly concluded (Pet. 23) that "it is the function

of the trier of fact to resolve just such conflicts and ambiguities, and we are satisfied upon a reading of the whole record that the finding of the District Court that the seizure occurred on July 1, 1948, was not clearly erroneous." This is precisely the inquiry the court of appeals was required to make. *Commissioner* v. *Duberstein,* 363 U.S. 278; Rule 52(a), Federal Rules of Civil Procedure.*

The concurrent findings of the two courts below ought not be disturbed except upon an extraordinary showing of error, *Corn Products Co.* v. *Commissioner,* 350 U.S. 46; *Comstock* v. *Group of Investors,* 335 U.S. 211, and no such showing was made here. There is no conflict, and further review of this factual inquiry, important only to the litigants themselves, is unwarranted. *Rudolph* v. *United States,* 370 U.S. 269. The petition for certiorari should be denied.

Respectfully submitted,

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APRIL 1963.

*Petitioner's other contention, relating to the merits of the action, is irrelevant, since the case was decided on the statute of limitations.

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